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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977
No. 77-1121

STATE COMPENSATION INSURANCE FUND,

Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA; COUNTY OF LOS ANGELES, legally uninsured; and JENNIE R. BUSCH,

Respondents.

On a Petition for a Writ of Certiorari
Directed to the Court of Appeals
for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a worker suffers industrial injury as a result of cumulative trauma caused by stress and strain, and some of this stress and strain is shown by the evidence to have occurred during Petitioner's insurance coverage of the defendant employer, is it

a denial of due process to require contribution for the resultant award on the basis of Petitioner's time share of the employment?

2. Does Section 5500.5 of the Labor Code of the State of California deny equal protection to Petitioner?

STATEMENT

This litigation concerns the proper contribution to a death benefit award in a workers' compensation case to be assessed against the two co-defendants, Petitioner State Compensation Insurance Fund and Respondent County of Los Angeles, legally uninsured.

The late District Attorney of Los Angeles County, Joseph P. Busch, began employment in the District Attorney's office on February 5, 1952 and remained in that employment until he died on June 27, 1975, from coronary arteriosclerosis. Coverage for workers' compensation insurance was by Petitioner State Fund up through June 30, 1969, or 74.37% of Mr. Busch's employment. During the remaining 25.63%, Respondent County of Los Angeles was legally uninsured.

Evidence submitted at the initial trial of this matter showed that Mr. Busch began as a Deputy District Attorney Grade I and progressed through the ranks until he became District Attorney. Evidence was unrebutted that he was under some stress and strain throughout the entire duration of his employment. It also showed that as he

advanced in rank the responsibilities and pressures on him increased correspondingly, being heaviest in his last position.

The medical evidence, specifically the report of Dr. Morton D. Kritzer of September 24, 1976, before the Workers' Compensation Appeals Board of the State of California was as follows, on the issue of stress during employment:

1. Mr. Busch "had been in a stressful situation for a lifetime or at least a lifetime that he worked" (in the District Attorney's office);

2. The relative weight of the stress was quantified by Dr. Kritzer as greater in the last few years: "approximately 80% was due to the time from 1969 on. 20% prior to 1969."

3. This quantification did not appear certain to the doctor. "It is difficult for me to evaluate exactly how much this patient was aggravated . . . and between what periods of time . . . . I trust that this answers your questions in what is now somewhat of a mystery to me."

(All quotations from Dr. Kritzer's report of September 24, 1976.)

Based on this evidence, and following California Labor Code §5500.5(d), an award of the death benefit in favor of the widow was made against Petitioner and Respondent in proportion to their respective shares of the coverage: Petitioner 74.37% and Respondent 25.63%.

ARGUMENT

I

INTRODUCTION

It is important to note that Petitioner's argument is in substance that it has been aggrieved by the selection of one way of measuring contribution: namely, the length of time during which the injury occurred, rather than by the estimate of the approximate weight of the stress during the later time period of the injury. Evidence in the case could support both methods. The California Legislature chose contribution by time length when it passed §5500.5(d) of the Labor Code. When Petitioner complains that the shares of liability were assessed "arbitrarily" and by "ignoring the evidence," what is referred to is the refusal of the Appeals Board and the appellate courts to select Petitioner's preferred method of measuring, rather than the Legislature's.

It should also be noted that Petitioner, on Page 9 of the Petition, misstates the Appeals Board's basis for decision. The Board did not rely on the proposition "that the stress was uniform throughout the deceased's employment." As long as there was stress during Petitioner's coverage period, §5500.5(d) compelled contribution on that basis, without reference to estimates of stress "weight" or uniformity.

Nor is Petitioner correct when on page 10 it asserts "the judge ruled he was bound to render his decision arbitrarily on the basis of coverage," that loaded adverb being Petitioner's own characterization. The Workers' Compensation Judge stated, correctly, in the Opinion on Decision, that the Labor Code Section involved "requires coverage based on time of exposure (rather than degree of stress)."

Lastly, Respondent would point out that Petitioner's claim on page 11 that the Appeals Board acknowledged that §5500.5(a) provides for apportionment according to the evidence is not justified by any language in the Board's Order and Opinion Denying Reconsideration. There is therein no reference in the Board's discussion to subsection (a). There is no statement as to any method of determining contribution for those parties not coming under subsection (d). The Board said, indeed, that "petitioner failed to demonstrate precisely how it has been deprived equal protection" (sic). Petitioner now seeks to remedy that lack by asserting an "acknowledgement" and a "ruling" by the Board that other carriers could "obtain apportionment on the basis of stressful exposure" (implying by this, on the basis of "weight" of stress), when the Board made no such acknowledgement or ruling.

In making its argument to the Supreme Court of the United States, Petitioner emphasized the supposed arbitrariness of the decision and the supposed fact that it ignored all the evidence, by failing to disclose the evidence supporting the length of exposure, and by giving the evidence on weight a certainty that the medical expert himself did not possess, leaving out the hesitancy and doubts

expressed in his report.

II

PETITIONER HAS NOT RAISED ANY SUBSTANTIAL FEDERAL QUESTION

Since, as set forth in Rule 19 of the Rules of the Supreme Court, a review on writ of certiorari is not a matter of right but of scound judicial discretion, Petitioner must show some special and important reasons why it should be granted; why it is vital that the question be decided by the Supreme Court. A mere allegation of less than perfect fairness in the decision appealed is insufficient.

But this Petition does not set forth the consequences of the decisions for other litigants, or claim any conflict with other U.S. Supreme Court decisions, or Federal or California Appellate decisions.

Nor are there "a considerable number of suits . . . pending in the lower courts which will turn on resolution of these issues" (Massachusetts Trustees v. United States (1964) 84 S.Ct. 1236, 1239, 377 U.S. 235, 251). Indeed, in the less than five years since subsection (d) became effective on January 1, 1974, only four cases on the issue of computing "length" of stress versus "weight" of stress were reported in the California Compensation Cases; two involved this

Petitioner and this Respondent, and one of those was this case. (See Cal. Comp. Cases Vols. 39 through 42 and advance sheets for Vol. 43, covering the years 1974 through 1977 in bound volumes. This service reports all California workers' compensation cases of general interest and the great majority reported are those which the Courts of Appeal refuse to review.)

Nor will there be many future cases; the subsection was repealed effective January 1, 1978. Thus the case is one "not apt to have continuing future consequences as where a statute . . . has been repealed. . . ." (Mr. Justice Harlan, "Some Aspects of the Judicial Process in the Supreme Court of the United States," 33 Australian L. J. 108 at 112 (1959)), and therefore it is inappropriate for Supreme Court review. The resolution of this case is not likely to have any immediate consequences beyond the particular facts and parties involved.

The legal point involved is a comparatively trivial one. The legislature's choice of a "length of time exposed" measure of damages rather than a "relative weight of time exposed" is not one of tremendous national importance.

(Cf. Mr. Justice Marshall discussing a somewhat similar point - legislative attempts to solve the contribution problem in maritime cases - in Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc. (1944) 94 S. Ct. 2174 at 2178, 417 U. S. 106, 112: "Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor

Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case.") (Referring to Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp. (1952) 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318.)

The California legislature performed just such a balancing act among the competing interests of carriers, employers, injured employees and the Appeals Board in §5500.5, as amended effective January 1, 1974, a fact bitterly complained of by Petitioner in its Petitions to the California Appellate Courts.

There being no reasons of overriding national importance to disturb the effects of this now repealed statute, certiorari should not be granted.

III

PETITIONER'S DUE PROCESS ARGUMENT

The claim in the Petition that §5500.5(d) set up a "presumption" is incorrect, nor was Petitioner precluded from presenting its defense to the "main fact which is to be presumed" (unstated, but apparently the proper share of the award). Evidence could have been submitted rebutting the claimed period of coverage, the claimed period of employment, or the claimed exposure to the hazards of stress during some

or all of Petitioner's coverage. All that was precluded was the substitution of one way of measuring stress for another.

Petitioner cites only cases relating to the validity of presumptions. These lack relevance to Petitioner's real argument. Indeed, one of the cases cited states:

> "But this Court has never so construed the limitation imposed by the Fourteenth Amendment upon the power of the State to legislate with reference to particular employments as to render ineffectual a general classification resting upon obvious principles of public policy because it may happen that the classification includes persons not subject to a uniform degree of danger."
>
> Mobile, J. & K. C. R. R. v. Turnipseed (1910) 219 U.S. 35, 40, 31 S. Ct. 136, 137.

It is precisely Petitioner's argument in the instant case that because the decedent was not subject to "a uniform degree of danger" throughout his employment, the Fourteenth Amendment is violated by a classification based on the period of insured employment.

IV

PETITIONER'S EQUAL PROTECTION ARGUMENT

This argument required lengthy discussion of subsections (d) and (e) of §5500.5 but, as the Appeals Board remarked below, nowhere shows how Petitioner has been deprived of equal protection.

A bare claim to that effect is insufficient; it must be shown (not merely asserted) that a comparable or similar group has been given more favorable treatment. Ellis v. Dixon (1954) 349 U.S. 458, 460-462.

(Note that the following cases, all decided before §5500.5(d) was enacted, recommended that the liability of co-defendants be based on their time share of a continuing trauma: State Compensation Insurance Fund v. Industrial Accident Commission (1954) 125 Cal.App.2d 201, 204, 270 P.2d 55, 57; 19 Cal. Comp. Cases 98, 100; Royal Globe Insurance Co. v. Industrial Accident Commission (1965) 63 Cal.2d 60, 403 P.2d 129, 30 Cal. Comp. Cases 199, and cf. the Writ Denied case of Zenith National Ins. Co. v. W.C.A.B. (1966) 31 Cal. Comp. Cases 295. See also Charles Swezey, in "Repetitive Trauma as Industrial Injury in California" 21 Hastings L. J. 631 at 643 (Feb. 1970) which recommends this method of contribution.)

There have been no cases in California holding that there must be a difference in computing

contribution between carriers who come under subsection (d) and those who come under subsection (e) since these became effective. Now that they are repealed, it is unlikely that there will ever be any.

V

CONCLUSION

There being no substantial question of great public importance presented by this case, and no violation of Petitioner's due process or equal protection rights under the Fourteenth Amendment to the Constitution of the United States, this Petition for Writ of Certiorari should be denied.

DATED: March 15, 1978

Respectfully submitted,

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